Supreme Court, U.S.
FILED

961205 JAN 29 1997

OFFICE OF THE CLERK

No. 96 -

In the Supreme Court of the United States

OCTOBER TERM, 1996

BRIAN A. BARNES, ADMINISTRATOR OF THE ESTATE OF DAVID L. PIERPOINT, PETITIONER

v.

NANCY PIERPOINT, FREDERICK TOWNSEND, ADMINISTRATOR OF THE ESTATES OF GEOFFREY PIERPOINT AND LAUREN PIERPOINT, DOLORES WILLIS, ADMINISTRATRIX OF THE ESTATE OF STACEY BJORKANDER AND AS GUARDIAN AD LITEM OF KATIE BOSKO AND SARA BOSKO, AND DOLORES WILLIS, RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN E. ARNOLD
Counsel of Record
JACK G. STEIGELFEST
Howard, Kohn, Sprague & FitzGerald
237 Buckingham Street
Post Office Box 260896
Hartford, CT 06126
(860) 525-3101

Counsel for Petitioner

HPP

QUESTION PRESENTED

Whether the statutory bar to the review of remand orders established by 28 U.S.C. § 1447(c) and (d) prevents a court of appeals from reviewing a remand order based not on any lack of subject matter jurisdiction or any failure to follow the procedure for removal, but based on a decision about the removability of the substantive claim.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(I)
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
A. Statutory Context	3
B. Proceedings Below	4
REASONS FOR GRANTING THE PETITION	7
A. As The Second Circuit Acknowledged, There Is A Conflict Among The Circuits Regarding The Appropriate Interpretation Of § 1447(c)	8
B. The Second Circuit's Interpretation of § 1447(c) Is Wrong	11
C. The Question Presented Has Important And Recurring Implications For The Scope Of Review Of A Remand Order, And The Recent Revision In § 1447(c) Does Not Obviate The Problem	13
CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

CASES

Argandona v. *Lloyd's Registry of Shipping*, 804 F. Supp. 326 (S.D.Fla. 1992) 14

Asgrow Seed Co. v. *Winterboer*, 115 S. Ct. 788 (1995) 11

Baris v. *Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir.), cert. denied, 502 U.S. 963 (1991) 9

City of Chicago v. *Environmental Defense Fund*, 114 S. Ct. 1588 (1994) 11

Commissioner v. *Lundy*, 116 S. Ct. 647 (1996) 12

Curtiss-Wright Corp. v. *Schoonejongen*, 115 S. Ct. 1223 (1995) 12

Director, Office of Workers' Compensation Programs, Dep't of Labor v. *Greenwich Collieries*, 114 S. Ct. 2251 (1994) 11

Filho v. *Pozos Int'l Drilling Services*, 662 F. Supp. 94 (S.D. Tex. 1987) 14

Foster v. *Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir.), cert. denied, 502 U.S. 908 (1991) 6, 9, 10

Honda Motor Co. v. *Oberg*, 114 S. Ct. 2331 (1994) 13

In re Continental Casualty Co., 29 F.3d 292 (7th Cir. 1994) 10, 12

TABLE OF AUTHORITIES — Continued

Page(s)

In re Medscope Marine, Ltd., 972 F.2d 107 (5th Cir. 1992) 9

Kearney v. *Litton Precision Gear*, No. CV 87-8335-KN, 1988 WL 383575 (C.D.Cal. 1988) 14

Melahn v. *Pennock Ins., Inc.*, 965 F.2d 1497 (8th Cir. 1992) 6, 10

Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) 8

Pelleport Investors, Inc. v. *Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir 1984) 10

Phillips v. *Offshore Logistics*, 785 F. Supp. 1241 (S.D.Tex. 1992) 14

Quackenbush v. *Allstate Ins. Co.*, 116 S. Ct. 1712 (1996) 10

Regis Associates v. *Rank Hotels (Management) Ltd.*, 894 F.2d 193 (6th Cir. 1990) 10

South Dakota v. *Bourland*, 508 U.S. 679 (1993) 11

Thermtron Products, Inc. v. *Hermansdorfer*, 423 U.S. 336 (1976) . . . . . *passim*

Things Remembered, Inc. v. *Petrarca*, 116 S. Ct. 494 (1995) 13

STATUTES

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES — Continued

Page(s)

28 U.S.C. § 1441 1

28 U.S.C. § 1441(b) 5

28 U.S.C. § 1446 . . . . . 2, 10, 12

28 U.S.C. § 1447 . . . . . 2, 10

28 U.S.C. § 1447(c) . . . . . *passim*

28 U.S.C. § 1447(d) . . . . . *passim*

46 U.S.C. App. §§ 761 *et seq* 3, 4

Pub. L. No. 104-219, 110 Stat. 3022 (1996) 8, 14, 15

MISCELLANEOUS

BENEDICT ON ADMIRALTY, § 122 14

BLACK'S LAW DICTIONARY (6th ed. 1990) 13

23 FEDERAL PROCEDURE: LAWYERS EDITION, MARITIME LAW AND PROCEDURE § 53:25 14

THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) 12

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) 11

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) 12

PETITION FOR A WRIT OF CERTIORARI

Brian A. Barnes, Administrator of the Estate of David L. Pierpoint, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App., *infra*, 1a-20a) is reported at 94 F.3d 813. The opinion of the United States District Court for the District of Connecticut (App., *infra*, 25a-27a) is reported at 892 F. Supp. 60.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its order dismissing defendant's appeal on September 5, 1996. App., *infra*, 21a-22a. A timely petition for rehearing was denied on October 31, 1996 (App., *infra*, 23a-24a), and the petition for a writ of certiorari is accordingly due on January 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 1441 provides in pertinent part:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant * * * to the district court of the United States * * * .

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. * * *

Title 28 U.S.C. § 1446 provides in pertinent part:

§ 1446. Procedure for removal

(a) A defendant * * * desiring to remove any civil action * * * from a State court shall file in the district court * * * a notice of removal* * * .

(b) The notice of removal * * * shall be filed within thirty days after the receipt by the defendant * * * of a copy of the initial pleading* * * .

Title 28 U.S.C. § 1447, as amended in 1988, provides in pertinent part[1]:

§ 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. * * *

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise* * * .

Additional statutory provisions of relevance are contained in the Appendix, *infra*, 30a-31a.

STATEMENT

28 U.S.C. § 1447(c) and (d), as construed by this Court in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), precludes appellate review of orders remanding cases to state court, but only where such orders are based on a

---

[1] 28 U.S.C. § 1447(c) was amended effective October 1, 1996, after the decision of the court of appeals in this case. See footnote 3, *infra*.

"defect in removal procedure" or on the lack of subject matter jurisdiction. In the present case, the court below, over a strong dissent, recognized that the district court *had* subject matter jurisdiction to entertain this case, which was brought under the Death on the High Seas Act (DOHSA), 46 U.S.C. App. §§ 761 *et seq.* And it found that there were no procedural defects in perfecting the removal of the case from state court. Nevertheless, explicitly bypassing the statutory text — and relying instead on snippets of legislative history — the panel majority concluded (App., *infra*, 7a) that "defect in removal procedure" is not "confined to remand motions based on procedural grounds." Rather, the majority concluded (App., *infra*, 10a), the phrase also includes any remand order based on a determination that "the removal was not authorized by law."

The panel majority's decision is plainly wrong, is in stark and acknowledged conflict with the decisions of at least two other Circuits, and has the unfortunate effect of insulating from appellate review a class of remand orders having little or nothing to do with a "defect" (much less a "defect in removal procedure"). Moreover, the decision affords district courts largely unchecked discretion to remand cases based on substantive federal law rulings (such as on the substantive removability of DOHSA actions at issue in this case), thereby depriving defendants of their statutory right to have federal courts decide federal law issues. For all of these reasons, the petition for a writ of certiorari should be granted.

A. Statutory Context

At all times relevant to this case, 28 U.S.C. § 1447(c) authorized federal district courts to remand cases to state courts where there is (1) a "defect in removal procedure" or (2) an absence of subject matter jurisdiction. 28 U.S.C. § 1447(d) generally provides, in turn, that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

In *Thermtron*, 473 U.S. at 345-346, this Court held that, in determining the reviewability of remand orders, 28 U.S.C. § 1447(d) must be "construed together" with 28 U.S.C. § 1447(c). In particular, the Court concluded, § 1447(d) precludes appellate review only of those remand orders that are based on a ground provided for in § 1447(c). Thus, under *Thermtron*, appellate review is foreclosed only where the remand order is based on a "defect in removal procedure" or on the lack of subject matter jurisdiction.

B. Proceedings Below

1. Respondents represent the estates, survivors, and descendants of Geoffrey Pierpoint, Lauren Pierpoint, and Stacey Bjorkander, who were killed on August 14, 1994, when the plane in which they were traveling crashed into the ocean 37 miles southeast of Sea Isle City, New Jersey. Petitioner is the Administrator of the estate of David L. Pierpoint, who owned and piloted the airplane. App., *infra*, 2a.

Respondents initiated this action by complaint filed in the Connecticut Superior Court. Petitioner filed a notice of removal to the United States District Court for the District of Connecticut on March 31, 1995. As grounds for removal, petitioner recited that the action was founded on a claim or right arising under the Death on the High Seas Act (DOHSA), 46 U.S.C. App. §§ 761 *et seq*. App., *infra*, 30a-31a. Respondents moved to remand the case, asserting that the action is not governed by DOHSA, but that even if it were, DOHSA cases, as a matter of substantive federal law, are not removable. App., *infra*, 25a.

In an order dated June 28, 1995, the district court remanded the case. App., *infra*, 25a-27a. The court recognized (*id*. at 26a) that respondents' claim was brought under DOHSA, a federal statute. Nevertheless, the court concluded (*id*. at 26a-27a):

> Cases * * * which arise under admiralty laws are not removable * * * . [C]oncurrent state jurisdiction over admiralty cases contradicts removability * * * . The present case arises under DOHSA and not, therefore, under the "Constitution, treaties or laws of the United States" for the purposes of 28 U.S.C. § 1441(b). Since there is no diversity of parties, the district court may not exercise jurisdiction under 1441(b) and remand is necessary.[2]

2. By a divided vote, the court of appeals dismissed petitioner's appeal, holding that appellate review was precluded by 28 U.S.C. § 1447(d). App., *infra*, 10a. The majority recognized (*id.* at 5a) that there was clearly subject matter jurisdiction in the district court because DOHSA "explicitly grants original subject matter jurisdiction to the federal courts." Accordingly, the majority reasoned, the district court's remand order cannot be read to rest on the absence of jurisdiction. Instead, the court stated (*id.* at 5a (footnote omitted)), the trial court's holding "likely rested on its conclusion that DOHSA claims 'arise exclusively in admiralty' and therefore are not removable." In short, the majority inferred (*id.* at 6a), "[t]he district court remanded the case because of the special treatment accorded admiralty cases, not because of a perceived lack of subject matter jurisdiction."

Having parsed the basis for the remand order, the majority turned to whether, under 28 U.S.C. § 1447(c) and

---

[2] The district court's remand order did not address petitioner's request that the controlling issue of law be certified for an interlocutory appeal. Petitioner therefore moved for reconsideration and/or clarification of the remand ruling. In its Ruling on Defendant's Motion for Reconsideration the district court affirmed its substantive federal law determination that "DOHSA cases are not removable" and denied certification. App., *infra*, 28a-29a.

(d), the order was reviewable. Over a vigorous dissent (see App., *infra*, 15a-20a), the majority held that the order was based on a "defect in removal procedure" and was therefore unreviewable. The court began by setting out (*id.* at 6a) "two conflicting ways to read" the operative portion of § 1447(c). On the one hand, the court noted (*ibid.*), the phrase "defect in removal procedure" could be read according to "the plain language of the statute," and thus confined "to mistakes by the parties regarding the timing, form or content of the removal." "On the other hand," the majority continued (*ibid.*), "one can interpret 'defect in removal procedure' more broadly to include all removals that are not authorized by law." Looking past the statutory text to the perceived purpose of § 1447(c), the panel majority discerned "no reason" why the phrase "defect in removal procedure" should be "confined to remand motions based on procedural grounds." In the majority's view (App., *infra*, 7a), moreover, "[t]he legislative history" of the provision — particularly as reflected in a House Committee Report — "strongly supports this conclusion." The court accordingly concluded (*id.* at 9a (emphasis in the original)) that the phrase "defect in removal procedure" encompasses "*all* challenges to removal based on any impropriety, whether procedural or substantive, in the removal procedure, (excepting those based on the district court's lack of subject matter jurisdiction)."

The majority "acknowledge[d] that at least two circuits" had taken a contrary view. App., *infra*, 13a (citing *Foster* v. *Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir.), cert. denied, 502 U.S. 908 (1991) and *Melahn* v. *Pennock Ins., Inc.*, 965 F.2d 1497 (8th Cir. 1992)). But the majority simply "disagree[d] with these decisions." *Id.* at 14a. According to the panel majority, the Third and Eighth Circuits had mistakenly "refrained from considering the language of the committee report to § 1447(c) on the grounds that 'defect in removal procedure' is an unambiguous term." *Id.* at 13a.

Applying "this very broad reading of the 'defect in removal procedure' language of § 1447(c) in conjunction with the directive of *Thermtron*," the majority concluded that the remand order in this case was not appealable. App., *infra*, 10a. The district court had "determined that cases brought under DOHSA are not removable, and thus, that the removal was not authorized by law." *Ibid.* According to the majority, "a remand on such a basis falls within the 'defect in removal procedure' language of § 1447(c). Thus, § 1447(d) and the Court's holding in *Thermtron* instruct us that we do not have jurisdiction to consider an appeal from this order." *Ibid.*

Judge Jacobs dissented. App., *infra*, 15a-20a. The dissent reasoned that, because the district court's remand order was not based on any procedural defect in the removal of the case, the remand order could not constitute a "defect in removal procedure" within the meaning of § 1447(c). In Judge Jacobs' view, the terms "defect in removal procedure" of § 1447(c) are not ambiguous, and by their plain meaning refer only to "where, when, how, and in what form notices of removal are to be filed." *Id.* at 16a. Judge Jacobs also pointedly disagreed with the majority's use of "a committee report from one house of Congress that suggests that a defect in procedure does not mean a procedural defect." Because the remand order in the present case was based on the court's substantive conclusion that DOHSA claims are non-removable — and not on any procedural defect — Judge Jacobs would have entertained the appeal on the merits.

REASONS FOR GRANTING THE PETITION

The Second Circuit's dismissal of petitioner's appeal was predicated, at bottom, on its conclusion that "defect in removal procedure" means not only procedural defects, but also any and all "removals that are not authorized by law." App., *infra*, 6a. That expansive construction of § 1447(c), which is shared by the Fifth Circuit, is concededly at odds with decisions of the Third and Eighth Circuits. Those

courts, with which the panel majority explicitly "disagree[d]" (App., *infra*, 14a), have sensibly confined the operative portion of § 1447(c) to genuine "defects" in removal procedure — technical breaches of procedure, not issues of substantive removability.

The Second Circuit's decision works considerable mischief. It would preclude appellate resolution of conflicting district court decisions on federal law, in this case the substantive removability of DOHSA cases. That is particularly problematic in the area of admiralty law (as here), where national uniformity is of surpassing importance. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 26-27 (1990). Because the decision below is incorrect and at odds with at least two other circuits — and because a very recent alteration in the text of § 1447(c) will not abate the problem (see pp. 13-15 *infra*) — further review is warranted.[3]

A. As The Second Circuit Acknowledged, There Is A Conflict Among The Circuits Regarding The Appropriate Interpretation Of § 1447(c)

The circuit courts are deeply divided on the question whether § 1447(c) encompasses (and thus, together with § 1447(d), shields from review) remand decisions based on

---

[3] Effective October 1, 1996, Public L. No. 104-219, 110 Stat. 3022 (1996), entitled "An Act to clarify the rules governing removal of cases to federal court, and for other purposes," amended 28 U.S.C. § 1447(c) to provide in pertinent part as follows:

> **§ 1447. Procedure after removal generally**
>
> * * *
>
> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)* * * .

the substantive non-removability of a claim. The court below, joining the Fifth Circuit, has held that a remand based on substantive non-removability is a "defect" within the meaning of § 1447(c). The Third and Eighth Circuits have taken a contrary view. Further review is warranted to resolve the conflict.

1. In the present case, the Second Circuit interpreted the provision "any defect in removal procedure" to include "*all* challenges to removal based on any impropriety, whether procedural or substantive, in the removal procedure (excepting those based on the district court's lack of subject matter jurisdiction)." App., *infra*, 9a (emphasis in original). Under this expansive reading, a "defect in removal procedure" includes even a substantive determination that the removal of the underlying claim is not authorized by law. App., *infra*, 13a. Applying its interpretation, the court of appeals held that § 1447(d) barred review of a remand order based on the purported non-removability of a federal claim brought under DOHSA.

The Second Circuit's interpretation of § 1447(c) is shared by the Fifth Circuit. See *In re Medscope Marine, Ltd.*, 972 F.2d 107, 110 (5th Cir. 1992); *Baris* v. *Sulpicio Lines, Inc.*, 932 F.2d 1540, 1544-1545 (5th Cir.), cert. denied, 502 U.S. 963 (1991). In a similar case involving the reviewability of a district court's determination that DOHSA claims are non-removable, the Fifth Circuit interpreted the phrase "any defect in removal procedure" to include "any defect that does not involve the inability of the federal district court to entertain the suit as a matter of its original subject matter jurisdiction." *Baris*, 932 F.2d at 1544-1545. Under the Fifth Circuit's view, a remand order based on any ground other than subject matter jurisdiction is, without more, a defect in removal procedure.

2. By contrast, in *Foster* v. *Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir.), cert. denied, 502 U.S. 908 (1991), the Third Circuit rejected the view that "any defect in removal

procedure" includes all non-jurisdictional bases for a motion for remand. *Id.* at 1213. Contrary to the Second and Fifth Circuits, the Third Circuit found the terms "any defect in removal procedure" to be clear and unambiguous and rejected any resort to legislative history. *Id.* at 1212-1213. Citing precedent from the Sixth and Ninth Circuits, the court of appeals held that § 1447(d) does not bar review of a remand order based on the interpretation of a forum selection clause. *Id.* at 1211; see *Regis Associates* v. *Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990); *Pelleport Investors, Inc.* v. *Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984). The court reasoned that a remand order based on a substantive decision on the merits, such as the interpretation of a forum selection clause, does not involve any issue of jurisdiction or defective removal and therefore is reviewable. *Foster*, 933 F.2d at 1211.

In *Melahn* v. *Pennock Ins., Inc.*, 965 F.2d 1497 (8th Cir. 1992), the Eighth Circuit adopted the reasoning of *Foster* and explicitly rejected the approach taken by the Fifth Circuit. The Eighth Circuit found the language "defect in removal procedure" in § 1447(c) to be unambiguous, and it therefore held that a remand order based on *Burford* abstention was reviewable notwithstanding § 1447(d). *Id.* at 1502-1503. This Court has recently upheld the latter holding. *Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1718 (1996).

The Seventh Circuit has also interpreted § 1447 more narrowly than the Second and Fifth Circuits. In *In re Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994), the Seventh Circuit interpreted "any defect in removal procedure" to mean those procedural defects that involve a non-compliance with the procedures for remand established by § 1446, which is titled "Procedure for removal." In holding that a *sua sponte* remand based on a procedural defect is reviewable because it is not based on a motion to remand as required by § 1447, the Seventh Circuit stated: "Section 1446

establishes procedures for remand, and a 'defect in removal procedure' means failure to comply with § 1446." *Id.* at 294.

The present case is an appropriate vehicle for resolving the conflict among the circuits regarding the reviewability of remand orders based on nonjurisdictional determinations of substantive law. The court below acknowledged that other circuits had taken a different view of § 1447(c), but it concluded that the other circuits simply got it wrong. Further review is warranted to resolve this conflict in the circuits.

B. The Second Circuit's Interpretation of § 1447(c) Is Wrong

The Second Circuit's sweeping interpretation of § 1447(c) is wrong for several reasons. Most importantly, it ignores the language of the statute and relies upon legislative history, even though the text of § 1447(c) is unambiguous. "When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co.* v. *Winterboer*, 115 S. Ct. 788, 793 (1995). The panel majority's interpretation, which ignores the ordinary meaning of the words in the removal statute, contravenes these basic principles. See *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994) ("it is the statute, and not the Committee Report, which is the authoritative expression of the law"); *Director, Office of Workers' Compensation Programs, Dep't of Labor* v. *Greenwich Collieries*, 114 S. Ct. 2251, 2259 (1994); *South Dakota* v. *Bourland*, 508 U.S. 679, 694 (1993).

"Any defect in removal procedure" cannot be read to include the substantive removability of a claim. According to its ordinary usage, a "defect" is the "absence of something necessary for completeness, perfection, or adequacy in form or function." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 591 (1986). The word connotes a deficiency in the formal requirements that are needed for completeness.

A remand order based on the application of substantive law, whether it be the law of waiver or admiralty or the

common law, simply does not involve a "defect" as that term is commonly understood. There is nothing "absent" or "incomplete" about the removal in such cases. Rather, these cases involve a preclusion of the removal based on the court's determination of the substantive nature of the underlying claim. For the cases involving forum selection clauses, the substantive issue is the law of waiver. For the cases involving DOHSA claims, the law purportedly is admiralty law or perhaps federal common law. Determinations about these substantive federal matters do not involve any "defects," at least not in any usual sense of the word.

This understanding of "defect" is buttressed by consideration of the definition of "procedure," — within the terms "defect in removal procedure." As this Court has recognized, "[a] 'procedure,' as that term is commonly understood, is a 'particular way' of doing something, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1807 (1976), or 'a manner of proceeding,' THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1542 (2d ed. 1987)." *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1229 (1995).

Thus, taken all together, a "defect in removal procedure" is some deficiency in the formal requirements for the manner of proceeding to accomplish a removal. Such procedural requirements involve only the place, time, manner, and notice required for filing a notice of removal.

These aspects of "removal procedure" are set forth in § 1446, which is entitled "Procedure for removal." 28 U.S.C. § 1446; *Continental Casualty*, 29 F.3d at 294. Section § 1447(d)'s bar to reviewing remand orders based on defects in removal procedure must be understood as a reference to the specific procedures for removal set forth in § 1446. See *Commissioner* v. *Lundy*, 116 S. Ct. 647, 655 (1996).

By contrast, a substantive determination that a particular claim is not removable by its nature has nothing at all to do with the procedures for removal under § 1446 — and it is thus outside the limited scope of a "defect" in removal "procedure," to which § 1447(c) and (d) apply. The reason is obvious, at least to those who still recognize a distinction between substance and procedure. See BLACK'S LAW DICTIONARY 1203 (6th ed. 1990) (procedure is "[t]he mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right").

The Second Circuit's decision is also inconsistent with this Court's decisions on § 1447(c). This Court has never embraced the view that § 1447(c) encompasses all orders based on the non-removability of the underlying claim. To the contrary, this Court has long maintained that, despite the general statutory bar to review of remand orders, Congress did not intend to bar such review in all cases, thereby giving "carte blanche authority to the district courts to revise the federal statutes governing removal." *Thermtron*, 423 U.S. at 351. This Court recently reaffirmed that principle in *Things Remembered, Inc.* v. *Petrarca*, 116 S. Ct. 494, 497 (1995), which recognized that "only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)."

C. The Question Presented Has Important And Recurring Implications For The Scope Of Review Of A Remand Order, And The Recent Revision In § 1447(c) Does Not Obviate The Problem

Whether § 1447(c) and (d) precludes appellate review of a class of district court remand orders based on substantive determinations of law is an important and recurring question. There is a "strong presumption favoring judicial review." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2342 (1994). Yet, the Second Circuit's expansive construction of § 1447(c) effectively insulates just about all remand orders from appellate review. Indeed, although the majority professed

that "[c]ertain justifications for remand will not fall within the * * * broad reading * * * [of] this decision" (App., *infra*, 12a), it is difficult to discern any logical stopping point. Nor did the majority suggest any principled limitation to its construction of the statute.

As a practical matter, moreover, the court's decision consigns the underlying substantive removal issue to the district courts alone — and that too is a problem where, as here, the district courts are themselves deeply divided on the matter. Compare *Phillips* v. *Offshore Logistics*, 785 F. Supp. 1241 (S.D.Tex. 1992) and *Kearney* v. *Litton Precision Gear*, No. CV 87-8335-KN, 1988 WL 383575 (C.D.Cal. March 17, 1988) (holding that DOHSA claims invoke federal question jurisdiction, and therefore denying motion to remand DOHSA claims) with *Argandona* v. *Lloyd's Registry of Shipping*, 804 F. Supp. 326 (S.D.Fla. 1992) and *Filho* v. *Pozos Int'l Drilling Services*, 662 F. Supp. 94 (S.D. Tex. 1987) (remanding DOHSA claims). See also 23 FEDERAL PROCEDURE: LAWYERS EDITION, MARITIME LAW AND PROCEDURE § 53:25, at 390 ("the jurisdictional grant of the Death on the High Seas Act is unclear"); BENEDICT ON ADMIRALTY, § 122 at 8-6 (the removability of some maritime claims is "not free from doubt").

The decisions of the Second and the Fifth Circuits would prevent the courts of appeals from ever resolving conflicting district court decisions on remand motions based on substantive federal law. Such a result would lead to inconsistency, uncertainty, and unfairness in the application of substantive federal law by the district courts. Such a result and its effect on the orderly administration of justice in the federal courts make this issue of fundamental federal concern.

What is more, the recent amendment to § 1447(c) does not diminish the importance of the question presented. In place of "any defect in removal procedure," Congress has substituted the words "any defect other than lack of subject matter jurisdiction." United States District Court: Removal

Procedure, Pub. L. No. 104-219, 110 Stat. 3022 (1996). But the new version, like its immediate predecessor, still turns on the word "defect" — which, as we noted, means a technical deficiency that deprives a process of "completeness" or "perfection." It does *not* include *substantive* questions of removability.

In short, notwithstanding the language change, there is no reason to believe that the Second and Fifth Circuits will alter their expansive readings of § 1447(c) — readings that, as a practical matter, foreclose appellate review of virtually all remand orders. Nor is there good reason to believe that the Third and Eighth Circuits will suddenly conclude that § 1447(c) insulates from appellate review remand orders not based on technical "defects" or the absence of subject matter jurisdiction, but based on the substantive removability of the underlying claim.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

STEVEN E. ARNOLD
Counsel of Record
JACK G. STEIGELFEST
Howard, Kohn,
Sprague & FitzGerald
237 Buckingham Street
Post Office Box 260896
Hartford, CT 06126
(860) 525-3101

Counsel for Petitioner

JANUARY 1997

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 95-7736

[Filed: Sept. 5, 1996]

NANCY PIERPOINT, FREDERICK TOWNSEND, Administrator of the Estates of Geoffrey Pierpoint and Lauren Pierpoint; DOLORES WILLIS, Administratrix of the Estate of Stacey Bjorkander and as Guardian Ad Litem of the Estates of Katie Bosko and Sara Bosko, DOLORES WILLIS,	)	
Plaintiffs-Appellees,	)	ON APPEAL FROM
	)	THE UNITED STATES
v.	)	DISTRICT COURT
	)	FOR THE DISTRICT
BRIAN A. BARNES, Administrator of the Estate of David L. Pierpoint,	)	OF CONNECTICUT
Defendant-Appellant.	)	

Before: JACOBS, LEVAL and PARKER, Circuit Judges.

PARKER, Circuit Judge:

Plaintiffs represent the estates and dependents of three individuals who were killed when the private airplane in which they were flying went down thirty-seven miles off the New Jersey shore. They filed suit in Connecticut state court.

Defendant removed the case to federal court on the grounds that plaintiffs' claim arose under a law of the United States, namely the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761 *et seq*. Plaintiffs timely moved to remand the case to state court. This motion was granted by the district court on the ground that DOHSA cases are not removable. *Pierpoint* v. *Barnes*, 892 F. Supp. 60 (D. Conn. 1995) (Peter C. Dorsey, Chief Judge). Defendant appeals this holding. We decline to entertain his appeal, since we have no jurisdiction to review the remand order under 28 U.S.C. § 1447(d).

I. BACKGROUND

On August 14, 1994, David Pierpoint, Geoffrey Pierpoint, Lauren Pierpoint and Stacey Bjorkander were killed when the plane in which they were travelling crashed into the ocean 37 miles southeast of Sea Isle City, New Jersey. The airplane was owned and piloted by David Pierpoint. Representing the estates of Geoffrey Pierpoint, Lauren Pierpoint and Stacey Bjorkander, and their descendants, plaintiffs filed suit in Connecticut Superior Court seeking damages from the estate of David Pierpoint.

Defendant removed the case to federal court on March 31, 1995. Plaintiffs successfully moved to remand the case claiming, *inter alia*, that DOHSA cases are not removable. The district court agreed with plaintiffs, holding:

> Cases . . . which arise under admiralty laws are not removable. . . . [C]oncurrent state jurisdiction over admiralty cases contradicts removability. . . .
>
> DOHSA cases arise exclusively in admiralty. . . .
>
> The present case arises under DOHSA and not, therefore, under the "Constitution, treaties or laws of the United States" for the purposes of 28 U.S.C. § 1441(b). Since there is no diversity of parties, the district court

may not exercise jurisdiction under 1441(b) and remand is necessary.

Pierpoint, 892 F. Supp. at 61. The district court declined to certify this issue for interlocutory appeal. Nevertheless, defendant appeals the district court's remand order, claiming that it was based on an "erroneous interpretation of federal substantive law."

We find that we do not have jurisdiction to review this remand order under 28 U.S.C. § 1447(d). Thus, we dismiss the appeal for lack of appellate jurisdiction.

II. DISCUSSION

This case presents at least one, and potentially two, extremely complicated issues of first impression in this Circuit. First, when are district court remand decisions appealable to the Court of Appeals? Second, if we have jurisdiction to review the remand order in this case, did the district court correctly conclude that DOHSA cases arise exclusively in admiralty and are therefore not removable from state to federal court? We find that we do not have jurisdiction to review this remand decision, thus, we do not reach the second question.

A. The Appealability of Remand Orders

To understand this question of appellate jurisdiction, one must be familiar with both the text of the remand statute, and the gloss the Supreme Court has put on it. The statute provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise...." 28 U.S.C. § 1447(d). Despite the broad language of the statute, it is "not dispositive of the reviewability of remand orders in and of itself." *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345 (1976). In *Thermtron*, the Supreme Court held that § 1447(d) must be "construed together" with § 1447(c).

> Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court. But *we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.*

Id. at 351 (emphasis added).

When *Thermtron* was decided, § 1447(c) provided that a district court "shall" remand a case "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction . . . ." *Id.* at 342. The Court held that a district court's order remanding a case due to the overcrowding of its docket was not within the scope of § 1447(c), and was therefore reviewable in spite of the language of § 1447(d)." *Id.* at 351.

After the decision in *Thermtron*, in 1988, Congress amended the language of § 1447(c) to read in pertinent part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c). This court has recognized that the *Thermtron* holding should be read to encompass the 1988 amendment. *LaFarge Coppee* v. *Venezolana De Cementos, S.A.C.A., C.A.*, 31 F.3d 70, 71-72 (2d Cir. 1994); *Hamilton* v. *Aetna Life and Casualty Co.*, 5 F.3d 642, 644 (2d Cir. 1993) (per curiam), *cert. denied*, 114 S. Ct. 1100 (1994). Thus, appellate review is now prohibited if remand was granted pursuant to a timely motion based on any defect in the removal procedure, or because the district court

determined that it lacked subject matter jurisdiction. *See Hamilton*, 5 F.3d at 644.

Accordingly, reviewability of the remand order depends on the district court's basis for granting it. Relying on the last paragraph of the order, in which the district court stated that "[t]he present case arises under DOHSA and not, therefore, under the 'Constitution, treaties or laws of the United States' for the purposes of 28 U.S.C. § 1441(b)," appellees argue that the court was dismissing for lack of subject matter jurisdiction, depriving this court of appellate jurisdiction under § 1447(d) and *Thermtron*.

In isolation, the above-quoted excerpt from the district court's order seems to support appellees' contention that the order was based on a perceived lack of subject matter jurisdiction over DOHSA. However, it is hard to believe that the court would question federal subject matter jurisdiction over DOHSA, since the statute explicitly grants original subject matter jurisdiction to the federal courts. 46 U.S.C. § 761. Instead, the court's holding likely rested on its conclusion that DOHSA claims "arise exclusively in admiralty" and therefore are not removable.[1]

Admiralty excepts a class of cases from the general rule that cases which could originally have been filed in federal court are removable to federal court at the option of the defendant. Common law maritime cases filed in state court are not removable to federal court, due to 28 U.S.C. § 1333's "saving to suitors" clause. Dating back to the Judiciary Act of 1789, this clause preserves a plaintiff's right to a state court forum in cases arising under the common law of the sea. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 363 (1959); 14 Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3673 (1985). Since federal and

---

[1] Whether or not the court was correct in that conclusion is an issue we specifically do not reach here.

state courts have concurrent jurisdiction over DOHSA, the district court concluded that DOHSA cases are not removable.[2] *See Pierpoint*, 892 F. Supp. at 61 (stating that "concurrent state jurisdiction over admiralty cases contradicts removability").

The district court remanded the case because of the special treatment accorded admiralty cases, not because of a perceived lack of subject matter jurisdiction. As a result, this court may not review the remand order if it was granted pursuant to a timely motion asserting a "defect in removal procedure." Plaintiffs' motion to remand was timely, having been filed within the proscribed thirty day period. Thus, the meaning of the phrase "defect in removal procedure" is at issue. Specifically, we must determine whether the perceived non-removability of DOHSA cases comes under the ambit of a "defect in removal procedure."

There are two conflicting ways to read this language. Appellant argues that this court should confine its reading of "defect in removal procedure" to mistakes by the parties regarding the timing, form or content of the removal. He claims that this reading is consistent with the plain language of the statute, given the legislature's selection of the term of art "procedure." On the other hand, one can interpret "defect in removal procedure" more broadly to include all removals that are not authorized by law. Under this interpretation, the removal of a case which is non-removable would fall within the rubric of "defect in removal procedure." *See In re Medscope Marine Ltd.*, 972 F.2d 107,

---

[2] In support of its decision, the district court expressed the view that, because the Jones Act is a part of the admiralty law, suits brought under it are not removable. We need not pass on the correctness of this reasoning because the non-removability of Jones Act cases is provided by an express statutory removal prohibition. *See Gonsalves* v. *Amoco Shipping Co.*, 733 F.2d 1020, 1022 (2d Cir. 1984).

110 (5th Cir. 1992); *Baris* v. *Sulpicio Lines, Inc.*, 932 F.2d 1540, 1545 (5th Cir. 1991) ("[W]hen section 1447(c) speaks of 'any defect in removal procedure,' it includes within its reach the bringing of an action not within the court's removal jurisdiction but that could have been brought originally in that court."); 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.168 [4.-1], at 644 (2d ed. 1989) ("The motion to remand must be made within 30 days after removal, if the objections are of a character that can be waived, such as ... matters pertaining to the procedure for removal or the non-removability of a proceeding otherwise within federal jurisdiction." (footnotes omitted)). The language of the statute is susceptible to either interpretation. Therefore, our task is to divine what Congress intended by the use of the language "defect in removal procedure." *See, e.g.*, *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986) (noting that "our role is to interpret the intent of Congress in enacting § 1983"); *Garcia* v. *United States*, 469 U.S. 70, 79 (1984) ("It is our responsibility to interpret the intent of Congress"); *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979) (holding that "the ultimate analysis is always one of Congress' intent").

Consideration of Congress' purpose in enacting § 1447(c) provides some insight into its intended meaning. Congress placed a strict time limit on motions to remand in order to prevent the delay, inefficiency, and unfairness resulting from late-stage, forum-shopping remand motions. There is no reason that Congress' concern with unfairness and inefficiency would be confined to remand motions based on procedural grounds. This leads us toward the conclusion that Congress intended the phrase "defect in removal procedure" to be interpreted broadly in order to subject a wide range of remand motions to the 30-day limit.

The legislative history strongly supports this conclusion. Although judicial inquiry into the meaning of a statute ends when the words of a statute are clear and unambiguous, *see*

Wetzler v. *FDIC*, 38 F.3d 69, 73 (2d Cir. 1994), where, as here, a congressional enactment is subject to more than one reading, legislative history may be used to shed light on the unclear language. *See Toibb* v. *Radloff*, 501 U.S. 157, 162 (1991) ("Where ... the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.") (internal quotations omitted); *United States* v. *Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (2d Cir.1993), *cert. denied*, 114 S. Ct. 2764 (1994); *Waters* v. *Commissioner*, 978 F.2d 1310, 1316 (2d Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993). A committee report, representing a collective statement by the drafters about the intended purpose of proposed legislation, is considered a particularly good indicator of congressional intent when it is otherwise difficult to ascertain. William N. Eskridge & Philip P. Frickey, *Legislation: Statutes and the Creation of Public Policy* 743 (2d ed. 1995) ("Most judges and scholars agree that committee reports should be considered as authoritative legislative history and should be given great weight."); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring) (objecting to the use of legislative history to interpret statutes, but excepting committee reports from his quarrel because they "presumably are well considered and carefully prepared").

Section 1447(c) was amended by the Judicial Improvements and Access to Justice Act of 1988, part of a decade-long effort by the House Committee on the Judiciary to "improve the administration of justice in the nation" by addressing problems of overcrowding, delay, and spiraling costs caused by the "torrent of litigation" besetting the federal judiciary. H. Rep. No. 889, 100th Cong., 2d Sess. 1, 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 5983-84. To that end, in addition to the amendment to § 1447(c), the act included, *inter alia*, reform of the federal rulemaking process,

diversity of citizenship jurisdiction, and court-annexed arbitration. *Id.* at 24-25, 1988 U.S.C.C.A.N. at 5984-85.

The amendment to § 1447(c) imposed a 30-day time limit for all motions to remand based on a "defect in removal procedure." Prior to the amendment, § 1447(c) required remand "if *at any time* before final judgment it appears that the removal was improvident." *Id.* at 72, 1988 U.S.C.C.A.N. at 6033 (emphasis added). According to the committee report the earlier provision needed revision because:

> [s]o long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. *The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction.* The amendment is written in terms of a defect in "removal procedure" in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded.

Id. (emphasis added). The purpose of the amendment then, was to avoid late-game forum shopping by plaintiffs by imposing a 30-day limit to ensure that improperly removed matters (excepting those where the court lacks subject matter jurisdiction) would be remanded early in the proceeding or not at all. We therefore conclude that it was the intent of Congress to create a strict time limitation on *all* challenges to removal based on any impropriety, whether procedural or

substantive, in the removal procedure (excepting those based on the district court's lack of subject matter jurisdiction). *See In re Medscope Marine Ltd.*, 972 F.2d 107, 109-10 (5th Cir. 1992) (amendment is "reconstitution of existing statute and jurisprudence with the addition of a strict time limitation on the privilege of filing remand motions"). *See also* 14A Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3739 (Supp. 1995) ("Although the statute could have been more clearly drafted, it seems clear that it means that the 30-day limit applies to *all motions to remand* except in cases in which the court lacks subject matter jurisdiction.") (emphasis added).

Moreover, the committee report explains that the use of the term "defect in removal procedure" was not intended, as appellant contends, to confine the applicability of § 1447(c) to mistakes concerning the timing, form and content of removal. Rather, that term was chosen to require filing of remand motions within 30 days of removal in all cases where the remand motion is premised on an asserted defect in the removal. This avoids any implication that the time limit would prevent remand "after disposition of all federal questions leaves only state law questions" which the court believes ought to be remanded. H. Rep. No. 889 at 72, 1988 U.S.C.C.A.N. at 6033.

Considering this very broad reading of the "defect in removal procedure" language of § 1447(c) in conjunction with the directive of *Thermtron*, that § 1447(d) should be read in light of § 1447(c), we conclude that the district court's order remanding this case is not appealable. The district court remanded the case based on a timely remand motion because it determined that cases brought under DOHSA are not removable, and thus, that the removal was not authorized by law. As we have explained, a remand on such a basis falls within the "defect in removal procedure" language of § 1447(c). Thus, § 1447(d) and the Court's holding in

Thermtron instruct us that we do not have jurisdiction to consider an appeal from this order.

This conclusion is in accord with the "'strong congressional policy against review of remand orders' [which] underlies § 1447(d)." *Things Remembered, Inc.* v. *Petrarca*, 116 S. Ct. 494, 500 (1995) (Ginsburg, J., concurring) (quoting *Sykes* v. *Texas Air Corp.*, 834 F.2d 488, 490 (5th Cir. 1987)).[3] Review of remand orders delays litigation and adds unnecessary expense. A firm policy of declining to review remand orders allows litigants to proceed with the litigation in a timely fashion in state court. *See Hernandez* v. *Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991).

Our holding is consistent with prior Second Circuit cases considering appellate jurisdiction over remand orders in light of the amendment to § 1447(c).[4] In *Hamilton* v. *Aetna Life and Casualty Co.*, 5 F.3d 642 (2d Cir. 1993) (per curiam), *cert. denied*, 510 U.S. 1130 (1994), this court held that it had

---

[3] This policy is also reflected in other statutes where Congress has made remand orders non-appealable. For example, in the bankruptcy context, a claim remanded under 28 U.S.C. § 1452(b) "on any equitable ground," may not be reviewed on appeal. 28 U.S.C. § 1452(b). *See In re Cathedral of the Incarnation*, 90 F.3d 28 (2d Cir. 1996). Similarly, 28 U.S.C. § 1334(d), also dealing with bankruptcy cases, provides that "[a]ny decision to abstain or not to abstain [with certain exceptions] is not reviewable by appeal or otherwise."

[4] This circuit has reviewed timely remand orders based on a party's claim of possible "defects in removal procedure" in at least two recent decisions. *See Minot* v. *Eckardt-Minot*, 13 F.3d 590 (2d Cir. 1994) (remand based on district court's invocation of abstention doctrine); *Travelers Ins. Co.* v. *Keeling*, 996 F.2d 1485 (2d Cir. 1993) (remand based on construction of contractual terms). However, in both of these cases, the court's analysis was based on the pre-amendment language of § 1447(c). *See Minot*, 13 F.3d at 592; *Travelers*, 996 F.2d at 1488 n. 2.

jurisdiction to review a remand order because the order was issued outside the 30 day time limit, and was thus not authorized by § 1447(c). In *LaFarge Coppee* v. *Venezolana De Cementos, S.A.C.A., C.A.*, 31 F.3d 70 (2d Cir. 1994), the court held that it lacked jurisdiction to consider a remand order after concluding that the district court had remanded for a "defect in removal procedure," namely, the untimeliness of the removal under the Federal Arbitration Act. *Id.* at 72.

Our decision does not mean that a remand order can be reviewed only if it was based on an untimely motion. Certain justifications for remand will not fall within the "defect in removal procedure" rubric despite the broad reading accorded that language by the committee report and by this decision. The Supreme Court recently recognized such a justification in *Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712 (1996), in which the Court held that "the District Court's abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure." *Id.* at 1718. The district court had decided to abstain from hearing the reinsurance case, brought on behalf of several insolvent insureds, on the grounds that "California has an overriding interest in regulating insurance insolvencies and liquidations in a uniform and orderly manner, . . . this important state interest could be undermined by inconsistent rulings from the federal and state courts." *Id.* at 1717 (citations and internal quotation marks omitted). Acknowledging that it had removal jurisdiction, the district court did not remand the case because the removal was unlawful, but because the case was better left in state court. Since this consideration does not relate to the lawfulness of the removal itself, the Supreme Court's decision that the remand order was reviewable is entirely consistent with our decision today. *See also Minot*, 13 F.3d at 592 ("since the District Court invoked abstention doctrines . . . to justify its remand, section 1447(d) does not bar appellate review").

Similarly, if a district judge today (following the amendment to § 1447(c)) were to remand a case for the same reasons as the district judge in *Thermtron*, the case would be reviewable under the amended terms of § 1447(c). The *Thermtron* district judge remanded *sua sponte* based purely on his overcrowded docket. The Court endorsed appellate review of that decision because the ground for remand was "wholly different from those upon which § 1447(c) permits remand." *Id.* at 344-46. A remand order based on the district court's scheduling concerns does not in any way relate to a "defect in removal procedure" (or a lack of subject matter jurisdiction). Thus, in spite of the subsequent amendment to § 1447(c), the reasoning of the *Thermtron* Court is still applicable.

Our holding today is also consistent with *Things Remembered, Inc.* v. *Petrarca*, 116 S. Ct. 494 (1995). In that case, the Supreme Court held that the district court's order remanding the case to bankruptcy court on the grounds of untimely removal was not reviewable, regardless of whether removal was based on the bankruptcy removal statute, 28 U.S.C. § 1452(a), or the general removal statute at issue in this case. *Id.* at 497. Thus, as it applies to this case, *Things Remembered* merely confirms that a remand order is not reviewable when it was grounded on untimely removal. This holding is not inconsistent with our determination that the term "defect in removal procedure" encompasses removals that were not authorized by law, since this category naturally includes removals that suffer from a procedural defect.

Finally, we take issue with the dissent's assertion that today's decision conflicts with caselaw in five other circuits. We acknowledge that at least two circuits have refrained from considering the language of the committee report to § 1447(c) on the grounds that "defect in removal procedure" is an unambiguous term. *See Foster* v. *Chesapeake Insurance Co.*, 933 F.2d 1207 (3d Cir. 1991); *Melahn* v. *Pennock Insurance*

Inc., 965 F.2d 1497 (8th Cir. 1992) (adopting the holding in *Foster*). We disagree with these decisions.

However, at least two of the decisions embraced by the dissent are not inconsistent with our decision in this case. For example, as it relates to our holding today, *Page* v. *City of Southfield*, 45 F.3d 128, 131 (6th Cir. 1995), like *Things Remembered*, stands for the unremarkable proposition that the phrase "defect in removal procedure" encompasses procedural defects.[5] This is certainly not inconsistent with our determination that the phrase encompasses all removals not authorized by law. *Compare In re Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994) (also holding that district courts cannot remand cases on their own motion for defects in removal procedure, but noting that "defect in removal procedure" means failure to comply with § 1446). Nor does today's decision conflict with the Ninth Circuit's decision in *Northern California District Council of Laborers* v. *Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034 (9th Cir. 1995), in which the court merely ruled that the district court could not remand a case based on a *procedural defect* raised more than 30 days after the filing of the removal petition.[6]

---

[5] The district court in *Page* had remanded the case *sua sponte* because not all of the defendants communicated their consent to removal within the proscribed 30-day period. The Sixth Circuit held that it did *not* have the authority to review this decision, since it fell within the purview of 1447(c). The court went on to remand the case to district court, however, on the ground that 1447(c) does not authorize *sua sponte* remands for procedural defects, but only pursuant to timely motions to remand. *Id.* at 131-34.

[6] Plaintiffs had filed a remand motion within 30 days of removal based solely on the argument that a forum selection clause required remand. They did not raise the procedural issue (failure to join a named co-defendant in the removal petition) until they filed a reply brief, more than 30 days after the filing of the removal petition.

III. CONCLUSION

The district court remanded *Pierpoint* to Connecticut state court based on a "defect in removal procedure" under 28 U.S.C. § 1447(c). Section 1447(d) deprives us of jurisdiction to review this order. Thus, the appeal is dismissed.

JACOBS, Circuit Judge, dissenting:

I respectfully dissent from the majority's conclusion that we lack appellate jurisdiction to hear Mr. Barnes's appeal.

The majority and I disagree on how to read § 1447(c). The statute provides that remand motions that are based on "any defect in removal procedure" must be made within 30 days, while remand motions asserting lack of subject matter jurisdiction may be made anytime. For convoluted reasons admirably sorted out in the majority opinion, we lack appellate jurisdiction to review the district court's decision in this case if the plaintiffs' remand motion (which was made within 30 days) was presented on either of these two grounds. Since the motion had nothing to do with any procedural defect in the defendant's removal of the case, I do not share the majority's conclusion that the motion was based on a "defect in removal procedure."

To read "defect in removal procedure" to cover this case, the majority relies on a committee report from one house of Congress that suggests that a defect in procedure does not mean a procedural defect.[1] The majority consults the report

---

[1] The majority cites Professors Eskridge and Frickey in support of the view that committee reports are authoritative indicators of congressional "intent"; but Eskridge and Frickey are quick to point out the "limitations on the usefulness of committee reports in giving meaning to ambiguous statutes." *Cases and Materials on Legislation* 743 (2d ed. 1995). One such limitation is based on the observation from public choice theory that Congress's decisions (particularly submerged ones such as the language that winds up in committee reports) bear the finger marks of interest groups:

after concluding that "defect in removal procedure" is ambiguous; but I see no ambiguity in that phrase. The word "procedure"--in legalese and the vernacular--is the mode and method of proceeding or going forward. *Black's Law Dictionary* 1367-68 (4th ed. 1951) ("The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right."); *Webster's Third New Int'l Unabridged Dictionary* 1807 (1986) ("a particular way of doing or of going about the accomplishment of something"; "the established manner of conducting judicial business and litigation"). It is "the machinery, as distinguished from its product." *Black's Law Dictionary* at 1368. Giving the word "procedure" its ordinary meaning, the term "removal procedure" describes where, when, how, and in what form notices of removal are to be filed. This is the subject of § 1446 which (unsurprisingly) is headed "Procedure for removal." I conclude that the first sentence of § 1447(c) unambiguously describes remand motions claiming that the notice of removal suffered from a procedural defect.

The majority's reading of § 1447(c) creates a new statute in which "removal procedure" means virtually anything having to do with the notice of removal, except for questions of subject matter jurisdiction. This construction, however, disregards the word "procedure" and thereby offends the rule that we must give meaning to each term included by

---

> Lobbyists and lawyers maneuver endlessly to persuade staff members (who write the committee reports) or their legislative bosses to throw in helpful language in the reports when insertion of similar language would be inappropriate or infeasible for the statute itself. "Smuggling in" helpful language through the legislative history is a time-tested practice.

Id. at 744.

Congress. The majority's reading of "defect in removal procedure" effectively recasts it to say "defect in removal."

The Supreme Court very recently interpreted § 1447(c) in a way that reinforces my reading of "defect in removal procedure." Without turning the pages of House committee reports, the Court concluded that remanding a case "on grounds of untimely removal, [is] precisely the type of removal defect contemplated by § 1447(c)." *Things Remembered, Inc.* v. *Petrarca*, 116 S. Ct. 494, 497 (1995). From this I infer that § 1447(c) "contemplate[s]" particular "types" of removal defects, and not others. Similarly, the Court explained that untimely filing of the notice of removal is a defect that fits "precisely" within § 1447(c), from which I infer that other defects evidently will not fit as well. If the statute includes all jurisdictional or non-jurisdictional defects (or "almost all," as the majority says), then the Court's categorizing would make no sense. See also *Quackenbush* v. *Allstate Ins. Co.*, 116 S. Ct. 1712, 1718 (1996) (abstention-based remand "does not fall into either category of remand order described in § 1447(c)").

All but one of the circuits that have considered § 1447(c) and the meaning of "defect in removal procedure" agree that it refers to procedural defects. (Parenthetical quotes are attached to the two citations that the majority opinion would distinguish.) *Foster* v. *Chesapeake Ins. Co.*, 933 F.2d 1207, 1213 (3d Cir.), *cert. denied*, 502 U.S. 908 (1991); *Page* v. *City of Southfield*, 45 F.3d 128, 131 (6th Cir. 1995) (The grounds "specified in § 1447(c)" are "a defect in removal procedure or lack of subject matter jurisdiction.... Here ... the district court ruled that the removal notice was procedurally defective...."); *Matter of Continental Casualty Co.*, 29 F.3d 292, 293-94 (7th Cir. 1994) (Easterbrook, J.); *Melahn* v. *Pennock Ins., Inc.*, 965 F.2d 1497, 1503 (8th Cir. 1992); *Northern Calif. Dist. Council* v. *Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995) ("The statutory purpose served by requiring defects in removal

procedure to be raised promptly would be defeated if a party were free to raise *such a procedural defect* more that 30 days after the filing of the notice of removal." (emphasis added)). Some of these courts have concluded that the language of § 1447(c) "could not be clearer," and have expressly declined to consider the legislative history on which the majority relies here. *Foster*, 933 F.2d at 1213; *see also Melahn*, 965 F.2d at 1503. Others have defined the "defect[s] in removal procedure" in § 1447(c) in terms of compliance or non-compliance with the "procedures for removal," as set out in § 1446. *See Continental*, 29 F.3d at 294. Only the Fifth Circuit has concluded that the phrase "defect in removal procedure" has nothing to do with procedure. See *In re Medscope Marine Ltd.*, 972 F.2d 107, 110 (5th Cir. 1992) (concluding that "the 'removed improvidently' language of pre-1988 section 1447(c) was replaced, without intent to change the meaning, with the 'defect in removal procedure' in the current section 1447(c)").

I agree with the majority that this is an issue of first impression in this Circuit. Still, it is worth pointing out that our most recent decisions interpreting § 1447(c) implicitly give a procedural cast to the phrase "removal procedure". See *LaFarge Coppee* v. *Venezolana De Cementos*, 31 F.3d 70, 72 (2d Cir. 1994) (untimeliness of removal constitutes a "defect in removal procedure"); *Minot* v. *Eckardt-Minot*, 13 F.3d 590, 592 (2d Cir. 1994) (district court's decision to remand based on abstention doctrine is reviewable)[2]; *Hamilton* v. *Aetna Life and Casualty Co.*, 5 F.3d 642, 644 (2d Cir.1993) (per curiam) ("[A]n order granting remand based either on a timely motion asserting a *procedural defect*

---

[2] The majority opinion notes *Minot*'s quotation of the pre-1988 language of § 1447(c). Maj. op. at 819 n.4. *Minot's* quotation of § 1447(c), however, appears in a sentence that deals with *Thermtron*, which is of course a pre-1988 case. In *Minot*, the case was removed in 1992 and remanded in 1993.

or on a lack of federal subject matter jurisdiction is not reviewable." (emphasis added)), *cert. denied*, 510 U.S. 1130 (1994).

The majority opinion quotes Miller, Wright, and Cooper, *Federal Practice and Procedure*, § 3739, for the proposition that, "Although the statute could have been more clearly drafted, it seems clear that it means that the 30-day limit applies to all motions to remand except in cases in which the court lacks subject matter jurisdiction." Maj. op. at 818. The treatise acknowledges that there are cases that reject that view, but justifies the broad statutory reading of the statute on the ground that "[i]t is hard to believe" that Congress would write § 1447(c) and yet "remain[ ] silent on when remand may be sought in the large and important class of cases left in the middle." Miller, Wright, and Cooper call this a "glaring casus omissus," *Federal Practice and Procedure*, § 3739 at 286 (1996 Supp.), taking the words from my mouth. But it cannot be expected that Congress will create perfect, seamless statutes. Congressional silence may reflect poor drafting or flawed understanding, or it may reflect a purposeful and conscious avoidance of a difficult issue on which consensus is unavailable. It is easy for me to believe that Congress enacted a statute that failed to account for a large class of cases. Along the same lines, the majority opinion asserts that "[t]here is no reason that Congress' concern with unfairness and inefficiency would be confined to remand motions based on procedural grounds." Maj. op. at 817. I think that one good reason for the statutory design is that procedural flaws (compared with others) can be detected sooner and more easily, and if forfeited are less of a loss. In any event, however, I am unwilling to improve on what Congress has given us, as I believe the majority has done.

In summary, I believe that we are barred from reviewing district court determinations that a removal notice was procedurally defective or that the court lacked subject matter

jurisdiction to hear the case, but that we otherwise have the power to review orders that remand cases to state court. Because the district court did not remand this case on either of these specified grounds, I would hold that we have appellate jurisdiction to hear the merits of this dispute.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 95-7736

[Filed: Sept. 5, 1996]

NANCY PIERPOINT, FREDERICK TOWNSEND, Administrator of the Estates of Geoffrey and Lauren Pierpoint and DOLORES WILLIS, Administratrix of the Estate of Stacey Bjorkander and as Guardian Ad Litem of the Estates of Katie Bosko and Sara Bosko, and DOLORES WILLIS,	)	
Plaintiffs-Appellees,	)	
v.	)	**ORDER**
BRIAN A. BARNES, Administrator of the Estate of David L. Pierpoint,	)	
Defendant-Appellant.	)	

Before: JACOBS, LEVAL and PARKER, Circuit Judges.

Appeal from the United States District Court for the District of Connecticut.

This cause came to be heard on the transcript of record from the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the appeal from the order of said district court be and it hereby is

dismissed for lack of jurisdiction in accordance with the opinion of this court.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 95-7736

[Filed: Oct. 31, 1996]

NANCY PIERPOINT, FREDERICK TOWNSEND, Administrator of the Estates of Geoffrey and Lauren Pierpoint and DOLORES WILLIS, Administratrix of the Estate of Stacey Bjorkander and as Guardian Ad Litem of the Estates of Katie Bosko and Sara Bosko, and DOLORES WILLIS	)	
Plaintiffs-Appellees,	)	
v.	)	**ORDER**
BRIAN A. BARNES, Administrator of the Estate of David L. Pierpoint,	)	
Defendant-Appellant.	)	

Before: JACOBS, LEVAL and PARKER, Circuit Judges.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Brian A. Barnes.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 3:95CV572 (PCD)

[Signed: June 28, 1995]

NANCY PIERPOINT, *et al.*)
)
Plaintiffs,)
v.)
)
BRIAN A. BARNES,)
Administrator of the Estate)
of David L. Pierpoint,)
)
Defendant.)

RULING ON MOTION TO REMAND

Defendant removed this action and asserted that plaintiffs' claims arise under the Death on the High Seas Act, 46 U.S.C. § 761 *et seq*. Plaintiffs move to remand pursuant to 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction. Plaintiffs allege that the action is not a claim arising under the Death on the High Seas Act and that, even if it is, the case is not properly removable.

I. BACKGROUND

David Pierpoint's Piper Aerostar crashed 37 miles southeast of Sea Isle, New Jersey. Plaintiffs allege that the crash, which killed all those on board, resulted from Pierpoint's negligence.

II. DISCUSSION

A. Death on the High Seas Act as the Exclusive Remedy

The Death on the High Seas Act (DOHSA) provides the exclusive remedy for wrongful death on the high seas. State courts have concurrent jurisdiction over DOHSA cases. *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 232 (1986); *See also Favaloro* v. *S/S Golden Gate*, 687 F. Supp. 475, 478 (N.D. Cal. 1987) "DOHSA preemption of wrongful death actions is complete." *Id.* The location alone of an airplane crash more than one marine league from shore gives rise to admiralty jurisdiction for DOHSA purposes. *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 263-264 (1972).

Where federal law provides an exclusive remedy for an injury and plaintiffs plead that injury, plaintiffs' pleading will be presumed to allege the federal law. *Bartholet* v. *Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1075 (7th Cir. 1992) (where federal law is pre-emptive, invoking state law is like a "spelling error" and should be corrected by the court).

The complaint alleges that Pierpoint's plane crashed more than one marine league from shore. Thus, DOHSA is plaintiffs' exclusive remedy, and the complaint is deemed to assert a DOHSA claim.

B. Removability of DOHSA Cases

Cases which lack diversity of parties and which arise under admiralty laws are not removable from a state court exercising its concurrent jurisdiction over admiralty claims. *Benedict on Admiralty*, 8-6 § 122 (7th ed. Supp. 1995); *cf. Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 371-372 (1959). A few courts have held otherwise. *See Phillips* v. *Offshore Logistics*, 785 F. Supp. 1241, 1242 (S.D. Tex. 1992) (reasoning that if concurrent state jurisdiction exists under DOHSA, the cause of action must be a federal question and removable). However, concurrent state jurisdiction over admiralty cases contradicts removability. A case arising under the Jones Act, 46 U.S.C. § 688, which provides a statutory remedy for a seaman's wrongful death,

can be brought in state or federal court. *Engel* v. *Davenport*, 271 U.S. 33 (1926). Yet Jones Act cases are not removable on the basis that they arise exclusively under admiralty law. *Azzopardi* v. *Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984).

DOHSA cases arise exclusively in admiralty. "Since DOHSA merely authorizes an admiralty action, a party proceeding under DOHSA must allege a theory of recovery cognizable by a court sitting in admiralty jurisdiction." *Best* v. *Honeywell, Inc.*, 491 F. Supp. 269, 270 (D. Conn. 1980). Moreover, no federal court has held that DOHSA or other admiralty laws generate *both* federal question jurisdiction and admiralty jurisdiction.

The present case arises under DOHSA and not, therefore, under the "Constitution, treaties or laws of the United States" for the purposes of 28 U.S.C. § 1441(b). Since there is no diversity of parties, the district court may not exercise jurisdiction under 1441(b) and remand is necessary.

III. CONCLUSION:

Accordingly, plaintiff's motion to remand (doc. # 4) is granted.

SO ORDERED.

Dated at New Haven, Connecticut, June 28, 1995.

/s/ Peter C. Dorsey
PETER C. DORSEY
CHIEF UNITED STATES DISTRICT COURT

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 3:95CV572 (PCD)

[Signed: July 20, 1995]

NANCY PIERPOINT, *et al.*)
)
Plaintiffs,)
v.)
)
BRIAN A. BARNES,)
Administrator of the Estate)
of David L. Pierpoint,)
)
Defendant.)

RULING ON DEFENDANT'S MOTION FOR RECONSIDERATION

Defendant requests a certification for appeal pursuant to 28 U.S.C. § 1292(b). Remand orders are not subject to appellate review. 28 U.S.C. § 1447(d). § 1292(b) applies if the Court's order "involves a controlling question of law as to which there is substantial ground for difference of opinion." This is not the case here.

Defendant cites three cases which have allowed appellate review after remand. One case involved the constitutionality of a statute. *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991). Another involved a highly uncertain question of a manufacturer "acting under" a federal officer. *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). Dow anticipated many more such suits and needed the relevant legal issue resolved. The third case involved a new procedural fact pattern. *Beisel* v. *AID*

Association for Lutherans, 843 F. Supp. 616, 617 (C.D. Cal. 1994) (timely removal, joinder of a non-diverse party, remand, dismissal of the non-diverse party, and a second removal over one year after commencement of the action).

None of these cases is on point. The Supreme Court has ruled on the issues in this case. The Death on the High Seas Act (DOHSA) applies to deaths arising from airplane crashes beyond one marine league from shore. *See Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 263-264 (1972). DOHSA is pre-emptive. *Offshore Logistics, Inc.* v. *Tallendire*, 477 U.S. 207, 232 (1986). DOHSA cases arise exclusively in admiralty. *Best* v. *Honeywell, Inc.*, 491 F. Supp. 269 (D. Conn. 1980). DOHSA cases are not removable. *See Benedict on Admiralty*, 8-6 § 122 (7th ed. Supp. 1995). Accordingly, defendant's motion to reconsider is granted but on reconsideration the previous ruling is adhered to.

SO ORDERED.

Dated at New Haven, Connecticut, July 20, 1995.

/s/ Peter C. Dorsey
PETER C. DORSEY
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX F

The Death on the High Seas Act, 46 U.S.C. App. §§ 761 *et seq.*, provides:

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 763. Repealed.

§ 763a. Limitations

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

Supreme Court, U.S.
FILED
APR 2 1997
OFFICE OF THE CLERK

No. 96-1205

In The

Supreme Court of the United States

October Term, 1996

BRIAN A. BARNES, ADMINISTRATOR OF THE ESTATE OF DAVID L. PIERPOINT,

Petitioner,

vs.

NANCY PIERPOINT, FREDERICK TOWNSEND, ADMINISTRATOR OF THE ESTATES OF GEOFFREY PIERPOINT AND LAUREN PIERPOINT, DOLORES WILLIS, ADMINISTRATRIX OF THE ESTATE OF STACY BIORKANDER AND AS GUARDIAN AD LITEM OF KATIE BOSKO AND SARA BOSKO, AND DOLORES WILLIS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GARRETT M. MOORE
Counsel of Record
STEPHEN JACQUES
MOORE, O'BRIEN, JACQUES & YELENAK
Attorneys for Respondents
700 West Johnson Avenue
Suite #207
Cheshire, Connecticut 06410
(203) 272-5881

70897
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

TABLE OF CONTENTS

	Page
Reasons for Denying the Writ	1
I. There Are No Compelling Reasons For Granting The Petition For A Writ Of Certiorari To Review A Remand Order Entered Pursuant To 28 U.S.C. § 1447(c).	1
Conclusion	6

TABLE OF CITATIONS

Cases Cited:

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712	5
National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479 (1951)	5, 6
Pierpoint, et al. v. Barnes, 892 F. Supp. 60 (D. Conn. 1995)	5
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955)	5
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 96 S. Ct. 584 (1976)	4, 5
Things Remembered, Inc. v. Petrarca, 516 U.S. __, 116 S. Ct. 494, 133 L. Ed. 2d 461 (1995)	4

Contents

	Page
United States v. Constantine, 296 U.S. 287, 56 S. Ct. 223, 80 L. Ed. 233 (1935)	5
Volvo of America Corp. v. Schwarzer, 429 U.S. 1331, 97 S. Ct. 284, 50 L. Ed. 2273 (1976)	5
Statutes Cited:	
28 U.S.C. § 1447(c)	1, 2, 3, 4, 5
28 U.S.C. § 1447(d)	1, 2, 4
Rule Cited:	
Supreme Court Rule 10	1, 3, 6
Other Authorities Cited:	
Black's Law Dictionary 94 (6th ed. 1990)	2
Black's Law Dictionary 418 (6th ed. 1990)	2

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI TO REVIEW A REMAND ORDER ENTERED PURSUANT TO 28 U.S.C. § 1447(c).

The petitioner's request for a writ of certiorari to review a remand order entered pursuant to 28 U.S.C. § 1447(c) should be denied because there are no compelling reasons justifying review. Whether or not to grant a petition for a writ of certiorari is a matter within the Court's discretion, and Rule 10 of the Rules of the Supreme Court of the United States dictates that such a petition will only be granted for compelling reasons. Rules of the Supreme Court of the United States, Rule 10.

Rule 10, which governs the granting of petitions for writs of certiorari, does not specifically define "compelling reasons"; however, it enumerates various factors which, although not controlling, illustrate the nature of the matters or issues which are significant enough to warrant review. Rules of the Supreme Court of the United States, Rule 10. None of the enumerated factors or circumstances, with the exception of that involving a conflict among decisions of the United States courts of appeals, apply in this case. Further, as will be seen below, the fact that United States courts of appeals may be divided on the issue presented does not constitute a compelling reason for granting this writ of certiorari.

The issue presented by this case, whether or not a remand order based upon a decision regarding the removability of a substantive claim is reviewable given the operation of 28 U.S.C. §§ 1447(c) and (d), does not compel review. The issue does not

involve an important matter; a recent amendment to 28 U.S.C. § 1447(c) renders the issue presented in the petition moot. Consequently, any conflict among the United States courts of appeals on the issue is irrelevant. The fact that the Second Circuit's decision below might insulate some remand orders from review and result in conflicts among the decisions of district or appellate courts was contemplated by Congress and is therefore not inappropriate. The operation of 28 U.S.C. §§ 1447(c) and (d) by their very terms precludes review of the particular order at issue. Finally, the issue is not of importance to the public but only to the parties involved in this litigation and has been rendered academic by the amendment to 28 U.S.C. § 1447(c).

Contrary to the petitioner's assertion, the recent amendment to 28 U.S.C.A. § 1447(c) renders the issue presented in his petition moot. The Court of Appeals for the Second Circuit interpreted the language of the subsection, which read "any defect in removal procedure", to include substantive as well as purely procedural matters. Congress altered the language "any defect in removal procedure" and replaced it with "any defect other than lack of subject matter jurisdiction." It cannot seriously be argued that the phrase "any defect" does not encompass substantive as well as procedural matters. The term "any" commonly means "all" or "every" although in context it may mean one or some. *See* Black's Law Dictionary 94 (6th ed. 1990). In the context of the statute it clearly means "all" or "every". Nothing in the term "defect" without a modifying or descriptive adjective confines that term to procedural matters. *See* Black's Law Dictionary 418 (6th ed. 1990) ("Defect. The want or absence of some legal requisite; deficiency; imperfection; insufficiency.").

The amendment to 28 U.S.C.A. § 1447(c) obviates all questions regarding whether or not the subsection applies to procedural as well as substantive matters. Consequently, any

question regarding the correctness of the Second Circuit's interpretation of the language "defect in removal procedure" is moot. Although the petitioner argues that the continued utilization of the word "defect" in the current version of the statute keeps the issue presented alive, his own argument regarding the correct interpretation of the statute as it existed at the time of the remand order belies this. Petitioner argues that the Second Circuit erred in its interpretation of the phrase "defect in removal procedure" because the language removal procedure cannot be viewed to include substantive law matters. *See* Petitioner's Brief, p. 12.

The petitioner's argument that a conflict requiring resolution exists among the courts of appeals with respect to the interpretation of 28 U.S.C. § 1447(c) is unpersuasive. The fact that a split of authority may exist among circuit courts does not automatically elevate an issue to one deserving of Supreme Court review. The conflict of decisions must involve an important matter. Rules of the Supreme Court of the United States, Rule 10. Even then, the fact that a conflict exists among the courts of appeals on an important matter is not controlling and is only one of a variety of factors to be considered by the Court in deciding whether to hear a matter. Rules of the Supreme Court of the United States, Rule 10. As demonstrated above, the issue presented in this case does not involve an important matter because the issue has been rendered moot.

The fact that the result of the Second Circuit's decision may be to render certain classes of remand orders unreviewable is not a compelling reason for granting the writ of certiorari in this case. The petitioner argues that the Second Circuit's ruling requires review because its effect is to insulate many remand orders from review, thereby relegating unfettered discretion to the district courts on the remand issue. *See* Petitioner's Brief, p. 14. This argument is ineffective. Such a result, should it occur,

does not vest the issue presented with such consequence as to justify the review by this Court. Congress, in enacting 28 U.S.C. §§ 1447(c) and (d), explicitly stated and thus expressly intended, that many if not most remand orders (those based upon reasons specified in 28 U.S.C. § 1447(c)) would be unreviewable, 28 U.S.C. §§ 1447(c) and (d). This Court has found those orders not subject to review. *Things Remembered, Inc. v. Petrarca*, 516 U.S. __, 116 S. Ct. 494, 496-497, 133 L. Ed. 2d 461 (1995).

Congress, in drafting and passing the legislation which made some remand orders unreviewable, did so intentionally, knowing that in many cases the district courts would be the sole arbiter of the remand issue. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584 (1976), dissent of Justice Rehnquist, at 355. In support of the absence of reviewability by higher courts is that protracted delays of litigation pending appellate review of such orders is avoided. Congress, cognizant that erroneous remand decisions would not thwart the litigants' substantive rights but merely require they be pursued in another forum, found it preferable for erroneous remand orders to stand rather than delay or disrupt litigation. *Id.* at 355. The natural and considered consequence of Section 1447(c) district court remand orders' lack of reviewability is that conflicts would develop among the decisions of different courts. The effect of which the instant petitioner complains is exactly that which Congress intended and which this Court has sanctioned. *See Thermtron Products, Inc.* at 345-346.

The operation of 28 U.S.C. §§ 1447(c) and (d) precludes the review the petitioner seeks. This Court's decisions in *Things Remembered, Inc.* and *Thermtron Products, Inc.* leave no question that any remand order entered by a district court based upon lack of subject matter jurisdiction or upon a timely raised defect in removal procedure is unreviewable. *Things Remembered, Inc.* at 497; *Thermtron Products, Inc.* at 345-346.

Evaluation of the district court remand order at issue here clearly discloses that the court determined that it lacked subject matter jurisdiction because the claim did not arise under the Constitution, treaties or laws of the United States and, therefore, it remanded the matter to state court. *Pierpoint, et al. v. Barnes,* 892 F. Supp. 60 (D. Conn. 1995) and Petitioner's Appendix, p. 27a. Because the basis of the remand order unquestionably fell within the ambit of 28 U.S.C. § 1447(c), the remand order, even if erroneous, is not subject to review. *Volvo of America Corp. v. Schwarzer,* 429 U.S. 1331, 1334, 97 S. Ct. 284, 50 L. Ed. 2273 (1976) and *Thermtron Products, Inc.* at 351. Likewise, the Second Circuit's decision holding that the remand order was based upon a "defect in removal procedure", Petitioner's Appendix, p. 10a, is also within the language of 28 U.S.C. § 1447(c) and is not appealable. *Volvo of America Corp.* at 285 and *Thermtron Products, Inc.* at 351.

Finally, the issue in question lacks any broad implications and is now, in fact, academic. Matters of significance only to particular litigants do not compel review on a writ of certiorari. *National Labor Relations Board v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502, 71 S. Ct. 453, 95 L. Ed. 479 (1951) citing *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 and *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed. 897 (1955) ("[This Court] does [not] sit for the benefit of the particular litigants."). There is no evidence that other existing or future litigants will be significantly, if at all, impacted by the issue presented here. Nor does the petitioner offer evidence of the number of persons, if any, whose liability or litigation will remain uncertain or be effectively stayed until this issue is resolved. Therefore, the issue is not a proper one for review on a writ of certiorari. *United States v. Constantine,* 296 U.S. 287, 290, 56 S. Ct. 223, 80 L. Ed. 233 (1935). Because the resolution of the issue presented does not have far reaching effects, it is an

inappropriate subject for review upon a writ of certiorari. *National Labor Relations Board* at 502. As established above, the issue presented has been rendered moot. It is not the function of the Court to decide academic, scholarly or episodic questions. *Rice* at 74. The petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied because there are no compelling reasons, as required by Rule 10 of the Rules of the Supreme Court of the United States, for granting it. The issue of which the petitioner seeks review does not present an important matter, and the present posture of the case is precisely that intended by the statutory and case law and contemplated by Congress.

Respectfully submitted,

GARRETT M. MOORE
Counsel of Record
STEPHEN JACQUES
MOORE, O'BRIEN, JACQUES
& YELENAK
Attorneys for Respondents
700 West Johnson Avenue
Suite #207
Cheshire, Connecticut 06410
(203) 272-5881